restrictions. *Id.* at 20. Second, both corruption and the appearance of corruption are constitutionally sufficient governmental interests to support contribution restrictions. *Id.* at 26 (finding it "unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1,000 contribution limitation").

Six years ago, in *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the Court applied these principles to Missouri's limits on the amounts candidates may receive in contributions. The Court found "no reason in logic or evidence to doubt the sufficiency of *Buckley* to govern" state regulations and reaffirmed that contribution restrictions should receive more relaxed scrutiny than expenditure restrictions; that is, the challenged regulation need only be "'closely drawn' to match a 'sufficiently important interest.'" *Id.* at 387-388 (quoting *Buckley*, 424 U.S. at 25), 397.[2] The Court recognized that *Buckley* had already found that the "'prevention of corruption and the appearance of corruption'" is a sufficiently important interest. *See id.* at 388 (quoting *Buckley*, 424 U.S. at 25-26).

The Court, consistent with prior cases, reaffirmed that where corruption or the appearance of corruption is identified as a basis for legislative reform, courts should be particularly reluctant to second-guess the legislature's finding.[3]

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[2] The Court clarified that, while it had applied that level of scrutiny in *Buckley* in the context of associational rights, it had "proceeded on the understanding that a contribution limitation surviving a claim of associational abridgment would survive a speech challenge as well." *Shrink Mo.*, 528 U.S. at 388.

[3] This deference was already well established. *See, e.g., Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 500 (1985) (observing the Court's "deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized"); *Federal Election Comm'n* v. *National Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second-guess a legislative determination as to the need for prophylactic

"The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink Mo.*, 528 U.S. at 391. Although "mere conjecture" will not suffice, *id.* at 392, the Court recognized that, even without the benefit of legislative history (which Missouri could not provide), "there [was] little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters," *id.* at 395. Thus, the Court placed an evidentiary burden on challengers to meet even a minimal showing of a need for limits and to demonstrate that the legislature was mistaken. *See id.* at 394 (finding the plaintiffs had failed to make "any showing of their own to cast doubt on the apparent implications of *Buckley*'s evidence and the record here").

The Court in *Shrink Missouri* also established the principle that contribution limits should be upheld unless they are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." 528 U.S. at 397.[4] Applying that principle to Missouri's contribution limits, the Court upheld a $1,075 contribution limit, concluding that, even considering approximately three-fold inflation, it was not "so different in kind" from the $1,000 limit sustained in *Buckley* as to warrant second-guessing the Missouri legislature's tailoring of the statute. *Id.* at 395. On remand, moreover, the Court of Appeals for the Eighth Circuit con-

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measures where corruption is the evil feared."); *California Med. Ass'n*, 453 U.S. at 199 & n.20 (sustaining the Federal Election Campaign Act's limit on contributions to multi-candidate political committees and recognizing the provision as "an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*," even if it was not the "least restrictive means of protecting the integrity of its legislative scheme") (plurality opinion).

[4] Similarly, in *Buckley*, the Court cautioned that "distinctions in degree become significant only when they can be said to amount to differences in kind." 424 U.S. at 30.

cluded, following "the teachings of the Supreme Court," that contribution limits for other state offices (which ranged from $275 to $1,075) were justified "in their entirety." *Shrink Mo. Gov't PAC* v. *Adams*, 204 F.3d 838, 840, 842 (8th Cir. 2000).

The importance of judicial deference to legislative judgments was most recently reaffirmed in *McConnell* v. *Federal Election Commission*, 540 U.S. 93 (2003), where the Court, in upholding the major provisions of the Bipartisan Campaign Reform Act ("BCRA"), explicitly acknowledged that "the respect that the Legislative and Judicial Branches owe to one another" was important to its analysis. *Id.* at 137. Such deference is a common and critical thread in the Court's campaign finance jurisprudence. *See, e.g., Federal Election Comm'n* v. *Beaumont*, 539 U.S. 146, 162 n.9 (2003) (deferring to congressional judgment concerning restrictions on corporate campaign contributions); *Federal Election Comm'n* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 464-465 (2001) (rejecting the argument that a provision limiting coordinated expenditures by political parties could have been more closely tailored and observing that "Congress is entitled to its choice" between "limiting [parties'] contributions and limiting [their coordinated] expenditures"). Indeed, there is an important interplay between the Court's deference to legislative judgments in this area of the law and the reliance legislatures place on the Court's steady precedent in tailoring their legislative judgments. *See McConnell*, 540 U.S. at 137 (acknowledging the importance of "the fact that in its lengthy deliberations leading to the enactment of BCRA, Congress properly relied on the recognition of its authority contained in *Buckley* and its progeny").

B. Vermont's Contribution Limits Are Justified By An Important, Judicially Recognized State Interest

Vermont's justifications for the contribution limits it selected in Act 64 are the same as those this Court sustained in *Buckley* and *Shrink Missouri*. Although the amount of evidence that a court requires in support of an asserted state interest "will vary up or down with the novelty and plausi-

bility of the justifications raised," the particular interest in avoiding actual or apparent corruption arising from large contributions is "neither novel nor implausible." *Shrink Mo.*, 528 U.S. at 391. Accordingly, states generally need not engage in extensive fact-finding to establish their interest in curtailing the risk that contributions deemed to be large in the context of a particular state's political practices may give rise to actual or apparent corruption or the phenomenon of "politicians too compliant with the wishes of large contributors." *Id.* at 389.

In this case, the evidentiary basis for the law enacted by the Vermont General Assembly was ample. In the years leading up to the enactment of Act 64, public officials in Vermont frequently expressed concern regarding the corrosive effect of money in politics. In 1997, the Governor advised the Vermont General Assembly, based on his experience, that "money does buy access and we're kidding ourselves and Vermonters if we deny it." Ex. Vol. III at E-0902.[5] Politicians were not alone in recognizing the problems; the media reported extensively on campaign practices that aroused suspicion of improper influence exercised by donors of sums of money that were large in the context of Vermont politics. Ex. Vol. III at E-0746-E-0826. As the district court noted, "[s]uch barometers have been used by many other courts in evaluating the governmental interest that underpins contribution limits." Pet. App. 56a (citing

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[5] *See also* "Improving the Quality of Elections: Campaign Reform in the New Age of Shame: Return of the State Capitals" (speech by Vermont Secretary of State James Douglas, delivered Oct. 23, 1991), Ex. Vol. III at E-0911; Christopher Graff, *Money Changes Opinions*, Burlington Free Press, Apr. 27, 1997, Ex. Vol. III at E-0763 (quoting Senator Jeb Spaulding as stating that "[t]he evidence is all around us that money is a negative influence on the impartial ordering of priorities and passage or failure of bills around here"); Ross Sneyd, *Politicians Line Up Behind Campaign Finance Reform*, Rutland Herald, Apr. 8, 1997, Ex. Vol. III at E-0772 (quoting Senate President Pro Tem Peter Shumlin as stating that "[t]here's no question (money) buys access to the system .... In my view, it adversely influences a citizen Legislature and elections for that matter." (first alteration in original)).

Daggett v. *Commission on Governmental Ethics & Election Practices*, 205 F.3d 445, 457 (1st Cir. 2000); *Adams*, 204 F.3d at 841-842).

Moreover, the General Assembly did its homework. Committees considering the Act conducted 65 hearings and heard more than 145 witnesses testify about, among other things, contribution patterns in Vermont's previous elections, the cost of campaigning, citizen polls concerning public perception of corruption, and whether particular donation amounts struck constituents as suspiciously large in the unique context of Vermont politics. Ex. Vol. I at E-0120-E-0186.

As the district court found, the evidence "overwhelmingly demonstrated that the Vermont public is suspicious about the effect of big-money influence over politics and that voter apathy is on the rise." Pet. App. 36a. The record further demonstrated "that large contributors often have an undue influence over the legislative agenda." *Id.* As to public perceptions of corruption, the district court pointed to a poll that determined that 74% of Vermont's voters felt that ordinary voters lacked influence over Vermont politics; the same poll found that 71% of voters thought that corporations had too much influence, and 70% thought that wealthy individuals had too much influence. Ex. Vol. III at E-0852.[6]

The record also includes the testimony of state legislators based on their extensive first-hand experiences in Vermont. Senator Cheryl Rivers testified that large donors often shape Vermont's legislative agenda and even determine whether a bill receives sufficient support from Senate leadership to move forward. Tr. VII-56-62. She also testified that the pressure to raise money makes it more difficult to pursue legislative initiatives contrary to the wishes of inter-

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[6] This Court and others have considered opinion polls to be appropriate measurements of public sentiment in assessing the validity of statutes like this one. *Shrink Mo.*, 528 U.S. at 394; *Daggett*, 205 F.3d at 457-458; *McConnell* v. *Federal Election Comm'n*, 251 F. Supp. 2d 176, 229 (D.D.C.), *aff'd in part, rev'd in part on other grounds*, 540 U.S. 93 (2003).

est groups that give large contributions. *Id.*[7] Senator Elizabeth Ready explained that the influence of campaign funding "starts at the beginning at election. The interests are involved in getting people elected. They may even be involved in recruiting candidates. They are involved all the way through, and they are very involved once you get to the legislative process within the statehouse." Tr. IX-87.[8]

Experts—both those of petitioners and respondents—agreed that large contributions at least appeared to affect legislators' voting behavior in Vermont. Professor Thomas Stratmann testified for the defendants that his empirical studies demonstrate that campaign contributions have a significant impact on legislative voting. Tr. VI-147 ("[W]hen legislators receive higher contributions, they are more likely to vote in the interests of the contributor."); *see also* Thomas Stratmann, *What Do Campaign Contributions Buy? Deciphering Causal Effects of Money and Votes*, Ex. Vol. IV at E-1533. The district court noted that even plaintiffs' experts agreed that "[t]he more favors government has to give out, the more resources that people will spend to obtain those

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[7] Senator Rivers testified, moreover, that "it's like the arms race. If you want to be in leadership in the Vermont House or Senate, the main criteria appears to have become your ability to raise large amounts of money from some of the organizations that the lobbyists that you see at the statehouse every day represent." Tr. VII-56. She also admitted that "when I get a call from a large campaign contributor, that will be a call that I return quicker than just another constituent." Tr. VII-72. Former Congressman Peter Smith explained that when a bill is introduced, legislators typically ask "what's the industry position, what's the union position ... what does the money want." Tr. VIII-25. Strikingly, Congressman Smith related that the National Rifle Association told him that if he reversed his position, "they would call off the dogs and they would make sure I got plenty of money and that I would be reelected." Tr. VIII-47.

[8] Although it may be inappropriate for this Court to defer to the legislature's determination whether contribution limits have the effect of "insulat[ing] legislators from effective electoral challenge," *Shrink Mo.*, 528 U.S. at 404 (Breyer, J., concurring), the district court in this case correctly concluded that the arguments that incumbents would be disproportionately affected by the contribution limits were "across the board ... speculative" (Pet. App. 60a).

favors." Ex. Vol. VI at E-2202 (letter from Dr. John Lott); *see also* Pet. App. 38a.

Against this backdrop, there can be little doubt that the district court and the court of appeals correctly concluded that the legislative and adjudicative record supported Vermont's conclusion that contribution limits were needed to protect state politics from actual and apparent corruption. The evidence "clearly surpasse[d] the quantum of evidence offered and accepted as sufficient in *Shrink Missouri PAC* and would meet an even higher standard if one were applicable." *Daggett*, 205 F.3d at 458.

C. Vermont's Contribution Limits Are Closely Drawn

"[A] court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Buckley*, 424 U.S. at 30 (quotation omitted). The Court in *Shrink Missouri*, observing this, held that in determining whether to sustain particular contribution limits, courts give substantial deference to legislative judgments and should not attempt to "fine tune" the precise levels of the limits. 528 U.S. at 388.[9] Courts typically allow legislatures to "weigh competing constitutional interests in an area in which [they] enjoy[] particular expertise" and give them "sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process." *McConnell*, 540 U.S. at 137. Thus, contribution limits will be upheld unless they are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink Mo.*, 528 U.S. at 397.

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[9] *See also State* v. *Alaska Civil Liberties Union*, 978 P.2d 597, 620 (Alaska 1999) (concluding that a legislature should determine appropriate contribution limits depending on the particular circumstances of the jurisdiction); *Daggett* v. *Webster*, 81 F. Supp. 2d 128, 139 (D. Me.), *aff'd following limited remand*, 205 F.3d 445 (1st Cir. 2000) ("If contribution limits are permissible, differences in their level from state to state should reflect democratic choices, not court decisions." (footnote omitted)).

As in *Buckley*, *Shrink Missouri*, and *McConnell*, ample record evidence here supports the court of appeals' holding that Vermont's contribution limits—in the unique context of Vermont—are closely drawn to meet that state's interests. Indeed, after holding extensive hearings, the Vermont legislature made the following specific findings:

> In the context of Vermont, contributions larger than the amounts specified in this act are considered by the legislature, candidates and elected officials to be large contributions.
>
> In the context of Vermont, contributions scaled in proportion to the size of the electoral district of the office and up to the amounts specified in this act adequately allow contributors to express their opinions, level of support and their affiliations.
>
> In the context of Vermont, candidates can raise sufficient monies to fund effective campaigns from contributions no larger than the amounts specified in this act.

1997 Vt. Laws Pub. Act 64, § 1(a)(3), (6), (7) (legislative findings).

The evidence presented at trial buttressed these legislative findings. The district court concluded that the limits did not have a severe impact on political dialogue based on evidence that: (1) during recent elections, less than 10% of the individual contributions exceeded the limits; and (2) the limits were high enough to permit effective campaigning in the recent Burlington mayoral election. Pet. App. 39a-41a.

The district court, for example, relied on the expert testimony of University of Vermont Professor Anthony Gierzynski. He considered the 1994, 1996, and 1998 elections and concluded that "it is clear that the contribution limits set by the legislature in 1997 would affect only a small percentage of contributors." Ex. Vol. III at E-0950. Approximately 90% of contributions to recent statewide candidates were under the limits set by Act 64, and more than 90% of contri-

butions were under the limits for state senate and house candidates. *Id.*

Professor Gierzynski opined, moreover, that "[t]he effect of the limits on senate and house candidates' revenues would be minimal." Ex. Vol. III at E-0954. Specifically, the percentages of revenue that would have been affected for state senate candidates were 10.1% in 1994, 10.8% in 1996, and 18.2% in 1998; the percentages of revenue affected in state house elections were 3.2% in 1994, 5.2% in 1996, and 6.5% in 1998. *Id.* As Professor Gierzynski explained, "[t]hese numbers suggest that the 1997 Act's limits would affect a small and replaceable part of senate and house candidates' revenues." *Id.*[10] Notably, Professor Gierzynski compared Vermont's contribution limits to those considered by the Court in *Shrink Missouri*. He concluded that "relative to the size of the constituency—and thus size of the campaign that is necessary—Vermont contribution limits (with the exception of the limit on Chittenden County senate candidates) are as generous or more generous than the Missouri limits recently upheld by the U.S. Supreme Court." *Id.* at E-0958.[11]

The district court also found that the evidence demonstrated that "[i]n the context of Vermont politics, $200, $300, and $400 donations are clearly large, as the legislature determined. Small donations are considered to be strong acts of political support in this state." Pet. App. 41a-42a. Even some of petitioners' witnesses agreed that contributions in

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[10] In the three elections considered, 89.6%, 82.6%, and 73.6% of the candidates for the Vermont House received *no* contributions over the $200 limit. Ex. Vol. III at E-0979. Approximately 40% of the Senate candidates during those years would have needed to make no adjustments. *Id.* In the 1994 and 1996 races, moreover, only 20% of the Senate candidates accepted more than three contributions that were over the $300 limit. *Id.*

[11] Because Chittenden County is a six-member senate district, the ratio of the contribution limit to the size of the constituency is somewhat different, which renders the contribution limits "slightly less generous." *Id.* at E-0954.

amounts greater than those Act 64 allowed were large in the context of Vermont. *See, e.g.*, Tr. II-201 (Patch). Having also considered the witnesses' near unanimous testimony that the limits set by the Vermont legislature allowed for meaningful contributions, *see, e.g.*, Tr. IV-101 (Summers); Tr. VII-80 (Rivers); Tr. IX-225 (Pollina), the court found that the contribution limits "accurately reflect the level of contribution considered suspiciously large by the Vermont public," Pet. App. 59a.

Also before the district court was testimony concerning whether candidates would be able to wage effective campaigns under new limits. Several candidates, campaign managers, and past officials testified that Act 64 would not prevent them from running effective campaigns. For example, Mark Snelling testified that even with Act 64's $400 contribution limit, a candidate for statewide office would be able to raise $300,000 to $400,000. Tr. I-40.[12] The district court also looked closely at the 1999 Burlington mayoral race, which at the time of trial was the only large election to have been held under the new limits. *Cf. Shrink Mo.*, 528 U.S. at 396 (examining campaigns that had been held under the contribution limits). The court concluded that mayoral candidates in the Burlington race remained able "to amass sufficient resources to run effective campaigns." Pet. App. 41a. This conclusion was well founded; bound by Act 64's limitation of $200 on contributions, the Burlington mayoral candidates in 1999 raised more than *five times* the amount raised by the candidates in the 1997 race. Ex. Vol. III at E-0957. This evidence also strongly indicates that the contribution limits will not unduly impair fundraising in competitive races, as petitioners suggest.

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[12] Former Secretary of State Don Hooper testified that "of course" he would be able to run an effective campaign under Act 64's contribution limits. Tr. V-23. Former Lieutenant Governor Peter Smith testified that the $300 and $400 contribution limits for statewide elections "absolutely" allow candidates to run effective campaigns. Tr. VIII-53.

Petitioners contend that there is no evidence that Vermont's prior contribution limits were insufficient.[13] But the evidence of actual or apparent corruption on which the legislature and district court relied occurred in the period during which the prior contribution limits were in force. Indeed, the Vermont General Assembly specifically found that "contributions larger than the amounts specified in this act are considered by the legislature, candidates and officials to be large contributions." 1997 Vt. Laws Pub. Act 64, § 1(a)(3). The record evidence demonstrates, moreover, that contributions in significantly lower amounts than the maximum permitted prior to Act 64 apparently led to lawmakers granting additional access to the contributors.[14]

A comparison to the facts of *Shrink Missouri* is instructive. In that case, the Court of Appeals for the Eighth Circuit concluded that Missouri's limits of $525 per election for Senate and $275 for House were constitutional. *Adams*, 204 F.3d at 842-843. As the district court in this case noted, Vermont's ratio of contribution limits to the size of constituency is quite close to that considered in Missouri: 0.00068 for Vermont compared to 0.00040 for Missouri. Pet. App. 58a. Constituency size is relevant to the analysis, for a candidate is not forbidden from soliciting contributions from other districts or other states, and yet the size of the candidate's constituency necessarily limits the number of voters that the candidate needs to reach. On that basis, Vermont's limits compare favorably with those upheld in Missouri.

The decision of the Court of Appeals for the First Circuit in *Daggett* is also instructive. There, the court of appeals examined a Maine law that limited campaign contributions to $250 for state representatives and state senators.

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[13] Prior to Act 64, candidates were limited to contributions from individuals of no more than $1,000 per election or $2,000 per cycle when a primary was held. 1988 Vt. Laws Pub. Act 263, § 3.

[14] For example, Senator Elizabeth Ready testified that when donors affiliated with the slate industry made $500 donations, they appeared to receive preferential treatment. Tr. IX-113.

Among other things, the court of appeals noted that the limit of $1,075 that the Supreme Court had upheld in *Shrink Missouri* applied in districts with more than 250,000 constituents, while the $250 limit at issue in *Daggett* applied in districts that averaged only 8,000 constituents. 205 F.3d at 459. After examining the campaign finance patterns in Maine and the typical costs of Maine campaigns, the court of appeals concluded that the $250 limit was constitutional. *Id.* at 459-461. *See also Montana Right to Life Ass'n* v. *Eddleman*, 343 F.3d 1085, 1096 (9th Cir. 2003), *cert. denied*, 543 U.S. 812 (2004) (upholding Montana's statutory limits of $100-$400 on campaign contributions made by individuals).

In sum, the holding of the district court, based on an extensive legislative and trial record, that Vermont's limits are closely tailored to address the threat and appearance of corruption in Vermont politics should be affirmed.

II. THE COURT SHOULD NOT NOW ADDRESS THE CONSTITUTIONALITY OF VERMONT'S EXPENDITURE LIMITS, BUT SHOULD DEFER SO THAT THE LOWER COURT PROCEEDINGS ON REMAND MAY EITHER CLARIFY THE RECORD OR ALTOGETHER ELIMINATE THE NEED FOR CONSTITUTIONAL ADJUDICATION BY THIS COURT

It is premature for the Court to review the constitutionality of Vermont's expenditure limits because the lower courts have not conclusively decided the issue and there is no countervailing need for an expeditious resolution. A critical inquiry remains before the district court on remand, and prudence counsels against this Court's addressing a delicate constitutional issue at this time, when the lower courts have not finally decided the issue in the first instance, and when it may ultimately prove unnecessary for this Court to do so. In these circumstances, this Court should affirm the court of appeals' remand order. Should the Court conclude that it is appropriate to address the expenditure issue in some manner, it should, at most, clarify that *Buckley* did not purport to impose a *per se* ban on expenditure limits.

A. The Interlocutory Procedural Posture Of This Case Counsels Strongly Against A Premature Constitutional Ruling By This Court On The Expenditure Issue

The interlocutory status of this case counsels against premature review of the expenditure issue. The court of appeals did *not* dispose of the question whether Vermont's expenditure limits are constitutional. Although the court of appeals found that Vermont's need for expenditure limits was supported by certain state interests, Pet. App. 91a, it did not reach a conclusion as to the second, essential prong of its First Amendment analysis: whether the particular limits Vermont adopted were sufficiently narrowly tailored to meet constitutional dictates. Instead, the court remanded the case to the district court for consideration of that critical issue. Because the district court had found spending limits *per se* unconstitutional, it had not examined "whether the legislature might have chosen either another type of regulation besides mandatory spending limits" (*e.g.*, voluntary limits) "or higher limits, that would achieve the goals . . . and yet impinge less on the First Amendment rights of candidates and voters." *Id.* at 164a.[15]

This Court's usual practice is to avoid deciding a case on the merits where the court below has not finally resolved the issue. "This reluctance is justified not only in the obvious cases in which lower court rulings have forestalled development of a trial record, but also in cases in which the Court has simply lost the advantage of prior appellate scrutiny of

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[15] The court of appeals correctly articulated the three-part test for determining whether the limits were narrowly tailored: "(1) the extent to which the State's interests are advanced by the regulation; (2) the extent to which candidates can conduct 'effective advocacy' under the limits; and (3) whether the government has proven the absence of less restrictive alternatives that are as effective in advancing its compelling interests, while impinging less on First Amendment rights." Pet. App. 148a. Applying this test to Vermont's expenditure limits, the court of appeals concluded that the first two prongs of the test were satisfied but remanded to the district court for further consideration of the third prong. *Id.* at 164a.

the record and deliberation of the arguments." 17 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* 2d § 4036, at 38-39 (1988). *See also National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) ([W]e do not decide in the first instance issues not decided below."); *Wood* v. *Strickland*, 420 U.S. 308, 326-327 (1975), *overruled in part on other grounds by Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) ("[B]ecause the District Court did not discuss [whether there was a procedural due process violation], and the Court of Appeals did not decide it, it would be preferable to have the Court of Appeals consider the issue in the first instance."). The Court recently practiced just this sort of caution in *Wisconsin Right to Life, Inc.* v. *Federal Election Commission*, No. 04-1581, 2006 WL 152676 (U.S. Jan. 23, 2006) (per curiam). There, the petitioner had brought an as-applied challenge to BCRA's electioneering communications provisions, which the district court dismissed based on its view that *McConnell* categorically foreclosed any such challenges. After rejecting that reading of *McConnell* and concluding that it was unclear whether the district court had also suggested that the particular ads at issue "fit the very type of activity *McConnell* found Congress had a compelling interest in regulating," the Court declined to reach the merits and remanded for further review. *Id.* at *1 (quotation omitted).[16]

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[16] The Court has not hesitated to deny a petition for writ of certiorari in such circumstances or, if necessary, dismiss a petition as improvidently granted. *See Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari) (explaining, in context of remand by court of appeals, that "[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction"); James Wm. Moore, 22 *Moore's Federal Practice* § 405.03[2][a][ii][A] (3d ld. 2005) (explaining that, although absolute finality is not required, "[t]he Court does not ordinarily grant certiorari . . . especially if further proceedings might affect the issue on which certiorari is sought"); *Wainwright* v. *City of New Orleans*, 392 U.S. 598, 598 (1968) (Harlan, J., concurring) (dismissing writ and describing record as "too opaque" to permit resolution of federal issue).

Here, there are sound reasons to permit the lower courts to further address the expenditure limit. First, the district court needs to consider whether Vermont's spending limits are the least restrictive means of furthering the state's asserted interests, *i.e.*, whether no other type of regulation could have advanced the state's interests while impinging less on First Amendment rights. In this connection, it may be relevant that the record shows that when Act 64 was originally introduced in the House, it contained a provision—not unlike the federal law sustained in *Buckley*—that provided for voluntary public financing of election campaigns tied to a candidate's acceptance of voluntary spending limits. Pet. App. 159a-160a. Notably, the record shows that the proposed voluntary spending limits appear to have been made mandatory in one of the House committees, but "[i]t is unclear from the current record why this change occurred, and the [d]istrict [c]ourt made no findings on this point." *Id.*

Second, even if the district court were to conclude that only mandatory spending limits could advance the state interests at issue, it must still consider why the particular amounts the Vermont legislature chose were preferred over higher amounts. Pet. App. 161a. The limits Vermont chose differed from those in the original Senate and House bills, and the record does not definitively indicate the basis on which the Vermont legislature selected the final amounts. *Id.* at 161a-162a.

As the court of appeals recognized, these unanswered questions bear on judicial review of the legislature's judgment. Pet. App. 166a ("Indeed, even a modicum of deference to the legislature and consideration for principles of federalism would seem to require consideration of its reasons for rejecting a potentially less-restrictive alternative scheme.").

Independent of this need for the district court to address fully the least restrictive means prong is the uncertainty of the result on remand. On remand, the district court or the court of appeals could decide that a voluntary spending limit, for example, is a less restrictive means, potentially

rendering further review of petitioners' claim by this Court unnecessary.

B. The Court Should Not Opine On A Delicate Constitutional Question That May Be Unnecessary To Decide This Case

The importance of the constitutional issues at stake, particularly in the context of reviewing a state statute, provides further reason to exercise judicial restraint. This Court has long followed the doctrine, grounded in the "basic principles regarding the institution of judicial review and this Court's proper role in our federal system," *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 14-15 (1993) (Blackmun, J. dissenting, joined by Souter, Stevens, and O'Connor, JJ.), that it "'ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable,'" *id.* at 14 (quoting *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944)). *See also Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."). Nor will the Court "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* (quotation omitted).[17]

The Court has applied this "cardinal" rule in First Amendment cases. *See, e.g.*, *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) ("Nor does the First Amendment involvement in this case render inapplicable the rule that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it."). This practice reflects the Court's understanding that it

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[17] *Cf. Clay* v. *Sun Ins. Office Ltd.*, 363 U.S. 207, 209 (1960) (remanding case to lower court for determination of two non-constitutional questions based on the "settled canons of constitutional adjudication [dictating that] the constitutional issue should have been reached only if, after decision of two non-constitutional questions, decision was compelled").

should not invoke its extraordinary authority to pass on the constitutionality of a law when other means are available for deciding the case. *See Slack* v. *McDaniel*, 529 U.S. 473, 484-485 (2000) (*per curiam*) (holding, under the avoidance principle, that where both a procedural and constitutional question must be answered to determine the appealability of a habeas petition, the former should be decided first); *Petite* v. *United States*, 361 U.S. 529, 531 (1960) (noting the "settled rule that the Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it'" (citation omitted)).

Should Vermont's expenditure limits survive a full review in the lower courts, there may well be reason for this Court to address constitutional limits on spending caps. Now is not that time. Although some would push the Court to reexamine *Buckley*—and to do so as soon as possible—doing so now would neither serve the orderly resolution of this case nor the broader institutional interests in constitutional adjudication that are at stake.

C. At Most, The Court Should Affirm The Court Of Appeals' Holding That *Buckley* Did Not Foreclose Expenditure Limits In All Circumstances

Should the Court offer guidance to the lower courts in connection with the remand, it should not go beyond the narrow question whether *Buckley* purported to ban all expenditure limits. The court of appeals, in remanding the case, correctly observed that *Buckley* "did not rule campaign expenditure limits to be per se unconstitutional," and that "narrowly tailored spending limits that secure clearly identified and appropriately documented compelling government interests" might conceivably pass muster under *Buckley*. Pet. App. 95a. This Court could affirm that narrow observation without breaking new constitutional ground.

Although *Buckley* recognized that the standard for sustaining an expenditure limit, like that at issue here, is a high one, the Court did not categorically reject any legislative effort to meet this heavy burden under any factual circumstances. The *Buckley* Court observed that Congress had

imposed the expenditure limitations contained in the Federal Election Campaign Act ("FECA") with the aim of protecting certain interests. 424 U.S. at 56-57. The Court rejected those interests as insufficient to justify the expenditure limits at issue on the record before it and thus struck them down. *Id.* In so doing, however, the Court was careful not to hold that expenditure restrictions were *per se* invalid.

In rejecting the necessity of FECA's expenditure limits to combat corruption, the *Buckley* Court tied its reasoning to the record before it, which demonstrated that the Act's contribution and disclosure limits already combated the "major evil" associated with large campaign expenditures: reliance on large contributions. 424 U.S. at 55. Similarly, the Court's rejection of the assertion that the expenditure limits were necessary to reduce the incentive to circumvent the contribution limits was based on its conclusion that "[t]here [was] *no indication* that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations [would] be insufficient to police the contribution provisions." *Id.* at 56 (emphasis added).

Thus, *Buckley* left open the possibility that legislatures might identify, under different factual circumstances, compelling interests that could justify campaign spending limits, provided the measures were narrowly tailored. Indeed, this Court has never embraced a categorical rule that a particular form of regulation of speech (or funding of speech) is unconstitutional—no matter how compelling the governmental interest at stake and no matter how narrowly tailored the rule. Consistent with this Court's overall approach to the First Amendment, *Buckley* did not adopt a wooden, *per se* approach and, instead, focused on the particular circumstances presented in that case.

CONCLUSION

The Court should affirm the court of appeals in upholding Vermont's contribution limits and affirm the court of appeals order remanding the expenditure issue pending full resolution by the lower courts.

Respectfully submitted.

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v.

WILLIAM H. SORRELL *et al.*,
Respondents/Cross-Petitioners.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF UNITED STATES SENATOR MITCH McCONNELL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Vermont's limits on candidate expenditures and campaign contributions are unconstitutional infringements on essential First Amendment freedoms.

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BRIEF OF UNITED STATES SENATOR MITCH McCONNELL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The question presented in this case is whether the First Amendment prohibits Vermont from placing severe restrictions on candidate expenditures and campaign contributions. The First Amendment is essential to the vitality and legitimacy of our political process. *Amicus*—a long-time advocate of First Amendment protection for political speech, and an official elected to federal office with a vital personal stake in the health of our political system—has a significant interest in the resolution of this question.

United States Senator Mitch McConnell is the senior United States Senator from the Commonwealth of Kentucky and the Senate Majority Whip. He is also the former chairman and a current member of the Senate Rules and Administration Committee, which is the committee responsible for reviewing all proposed legislation related to federal elections. During his four terms in the Senate, Senator McConnell has been one of the Senate's foremost champions of vigorous political debate and has consistently argued that restrictions upon free speech are constitutionally doubtful and will undermine popular participation in government. *See, e.g.*, Mitch McConnell, *In Defense of Soft Money*, N.Y. TIMES, Apr. 1, 2001, § 4, at 17; Mitch McConnell, *"Reform" Hurts Freedoms*, USA TODAY, Mar. 23, 2001, at A16.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or his counsel made a monetary contribution to the preparation or submission of this brief.

Senator McConnell's strongly held beliefs about the meaning of the First Amendment and the importance of robust political debate led him to challenge the constitutionality of the Bipartisan Campaign Reform Act of 2002 shortly after its enactment. *See McConnell v. FEC*, 540 U.S. 93 (2003). He also has participated as *amicus curiae* in several other cases contesting the validity of restrictions on political speech.[2] Senator McConnell's position as a United States Senator and his extensive experience with campaign finance legislation give him unique insight into the constitutional infirmities presented by the 1997 Vermont Campaign Finance Reform Act.

STATEMENT

1. All campaign finance restrictions are constitutionally suspect, because political speech is at the heart of the First Amendment. *Meyer v. Grant*, 486 U.S. 414, 425 (1988). In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court held that the government's generalized interest in removing corruption and the appearance of corruption from politics can support restrictions on campaign *contributions*, but is insufficient to justify limitations on candidate *expenditures*. *Id.* at 55. As the Second Circuit recognized, Vermont lawmakers passed the 1997 Vermont Campaign Finance Reform Act ("Act 64"), Vt. Stat. Ann. tit. 17, §§ 2801-2883, with the specific intention of

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[2] *See* Brief of United States Senator Mitch McConnell as *Amicus Curiae* in Support of Appellant, Wis. Right To Life, Inc. v. FEC (No. 04-1581); Brief of Senator Mitch McConnell, Missouri Republican Party, Republican National Committee, and National Senatorial Committee, as *Amici Curiae* in Support of Respondents, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (No. 98-963); Brief of Washington Legal Foundation, Fair Government Foundation, Allied Educational Foundation; U.S. Senators Alfonse M. D'Amato, Mitch McConnell; U.S. Representatives Henry J. Hyde, Bob Livingston, Joe Barton, Bob Walker; Bill Frenxel and Eugene McCarty, as *Amici Curiae* in Support of Petitioners, Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 614 (1996) (No. 95-489).

"provok[ing] a test case to overrule *Buckley* with regard to expenditure limits." Pet. App. 201a.

Act 64 includes restrictions on speech that extend well beyond what *Buckley* sanctioned. The Act limits all candidate expenditures during a two-year election cycle. Vt. Stat. Ann. tit. 17, § 2805a. The spending limits vary from $2,000 for a state representative in a single-member district to $300,000 for governor. *Id.* Incumbent spending is limited to 85-90% of these limits depending upon the office sought. *Id.* § 2805a(c). The Act defines candidate "expenditures" broadly to include "anything of value[] paid . . . for the purpose of influencing an election [or] advancing a position on a public question," *id.* § 2801(3), which even encompasses the use of a candidate's own car and telephone, and also money spent complying with the Act. Pet. App. 225a-226a, 229a-232a, 241a-242a. A candidate cannot avoid the Act's spending limits by resorting to personal funds: The Act applies equally to candidates who finance their campaigns with political contributions and to those who rely exclusively upon their own funds. Vt. Stat. Ann. tit. 17, § 2805a(a).

Act 64 considers an expenditure by any noncandidate to be "related"—and therefore attributable to a candidate's expenditure limit—where it is "intended to promote the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates, if intentionally facilitated by, solicited by, or approved by the candidate or the candidate's political committee." Vt. Stat. Ann. tit. 17, § 2809(c). The Act creates a rebuttable presumption that expenditures made by a political party or PAC are "related" if they primarily benefit six or fewer candidates. *Id.* § 2809(d). The cost of rebutting the presumption is assessed against the candidate's expenditure limit, even if the candidate prevails. Pet. App. 225a-226a.

Act 64 also sharply restricts contributions to candidates from a single source, a political party, or a PAC, with limits

ranging from $200 to $400 depending upon the office sought. Vt. Stat. Ann. tit. 17, § 2805. Because Act 64's expenditure and contribution limits apply on the basis of a two-year election cycle, the limits encompass expenditures and contributions for *both* a primary and general election. *Id.* §§ 2805, 2805a. These consolidated limits apply even where a candidate has a contested primary but his general election opponent does not. *Id.*

2. This case arises from three lawsuits challenging Act 64's constitutionality. Pet. App. 24a. The plaintiffs include a sitting Vermont state legislator, individuals who plan to seek Vermont political office, political parties and PACs, individual campaign contributors, and members of the Vermont electorate. Pet. App. 50a-51a. After a ten-day bench trial in 2000, the district court upheld many of the Act's challenged provisions, but enjoined enforcement of the expenditure limits as well as the limits on contributions from political parties. Pet. App. 24a-26a.

The district court's decision was appealed by all parties to the Second Circuit, which in August 2002 issued a 2-1 opinion sustaining almost all of Act 64's challenged provisions, including its expenditure limits. Pet. App. 95a. The court subsequently withdrew its opinion and then issued another 2-1 decision that again upheld most of the challenged provisions, while remanding the case for the district court to determine whether Act 64's expenditure limits are narrowly tailored. Pet. App. 96a-97a.

Although Vermont asserted five governmental interests in support of Act 64's expenditure limits, the Second Circuit considered only the first two: Vermont's purported interests in "avoiding the reality and appearance of corruption in elective politics and government" ("the anticorruption interest") and in "assur[ing] that candidates and officeholders will spend less time fund-raising and more time interacting with voters and performing official duties" ("the time-protection

interest"). Pet. App. 145a.[3] Contending that "the *perception* of corruption was an important part" of the anticorruption interest, Pet. App. 128a (emphasis in original), the court concluded that "Vermont has proven the strength of this interest, and its relationship to unlimited campaign spending." Pet. App. 135a. The court nevertheless acknowledged this anticorruption interest was insufficient to sustain Act 64's expenditure limits because *Buckley* had "reject[ed] the anticorruption interest" in this regard. *Id.* The Second Circuit therefore expanded its inquiry to consider Vermont's time-protection interest. Noting that the "*Buckley* Court . . . alluded to this time-protection interest only in passing," Pet. App. 137a, the court deemed the time-protection interest to be compelling because "the pressure to raise large sums of money greatly affects the way candidates and elected officials spend their time." The court opined that, "without spending limits, the contribution limits would exacerbate the time problem." Pet. App. 143a.

Notwithstanding *Buckley*'s invalidation of expenditure limits, the Second Circuit concluded that when the anticorruption and time-protection interests are "considered in tandem," they are "sufficiently compelling to support [Ver-

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[3] The five interests put forward by Vermont were:

(1) "avoiding the reality and appearance of corruption in elective politics and government";

(2) "assur[ing] that candidates and officeholders will spend less time fundraising and more time interacting with voters and performing official duties";

(3) promoting "electoral competition" and "protecting equal access to political participation";

(4) "bolster[ing] voter interest and engagement in elective politics";

(5) "enhanc[ing] the quality of political debate and voters' understanding of the issues."

Pet. App. 127a.

mont's] expenditure limits." Pet. App. 144a, 145a. Because the record was inadequate to determine whether the expenditure limits are narrowly tailored, however, the Second Circuit instructed the district court on remand to resolve "whether the legislature might have chosen . . . another type of regulation . . . that would still achieve the goals we sanction and yet impinge less on the First Amendment rights of candidates and voters." Pet. App. 164a.

Turning to Act 64's contribution limits, the court concluded that these restrictions are compatible with the First Amendment because they are "closely drawn" to the anticorruption interest and comparable to "similar limits upheld in Maine and Missouri." Pet. App. 169a-170a. The court also upheld the constitutionality of Vermont's related expenditures provision, rejecting the argument that the provision is impermissibly vague and unduly restrictive of political parties' and PACs' activities. Pet. App. 181a-182a.

Judge Winter dissented from the panel majority's holding that Act 64's expenditure limits serve a compelling governmental interest and that the Act's restrictions on political parties are constitutional. Pet. App. 190a (Winter, J., dissenting). Emphasizing that "great caution is in order where incumbent legislators pass laws affecting their electoral fate," he was troubled by the panel majority's excessive deference to the Vermont legislature, which "exceed[ed] even that accorded to decisions of an administrative body." Pet. App. 206a-207a.

Judge Winter perceived that Act 64 "limits or prohibits a vast range of ordinary political activities," Pet. App. 191a, and identified the Act's adverse impact on grass-roots political activity (Pet. App. 228a), candidate speech (Pet. App. 233a), challengers (Pet. App. 245a), the press (Pet. App. 250a), and party affiliates (Pet. App. 253a). He further recognized that *Buckley* had conclusively foreclosed the use of the anticorruption interest to support expenditure limits, and